

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

BARGER CONSTRUCTION, INC.

Employer

and

Case 4–RC–21531

METROPOLITAN COUNCIL OF  
CARPENTERS, SOUTHEASTERN  
PENNSYLVANIA, STATE OF  
DELAWARE AND EASTERN  
SHORE OF MARYLAND

Petitioner

**REGIONAL DIRECTOR’S DECISION AND ORDER**

The Employer, Barger Construction, has been a building and construction contractor. The Petitioner, Metropolitan Council of Carpenters, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer’s carpenters and apprentices. The Employer contends that the petition should be dismissed because it permanently closed its business after the petition was filed.

A Hearing Officer of the Board held a hearing, and the Petitioner filed a brief. I have considered the evidence and the arguments presented by the parties and, as discussed below, I have concluded that the petition should be dismissed.

In this Decision, I will briefly review the relevant law governing cessation of operations. Then I will set forth the facts adduced at the hearing and present the reasoning that supports my conclusion.

**I. RELEVANT CASE LAW**

The Board will not conduct an election where the closing of a business is imminent and certain. *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992); *Davey McKee Corp.*, 308 NLRB 839, 840 (1992); *Larson Plywood Co.*, 223 NLRB 1161 (1976); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646, 647 (1974). By extension, an election will not be held where the employer has already ceased all operations, with no plans to reactivate the business. Cf. *Marjo Food Stores*,

*Inc.*, 234 NLRB 646, 648 (1978). However, where the likelihood that the Employer's facility will close is too speculative to warrant withholding from the employees their statutory right to choose or reject union representation, the Board will direct an election. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997); *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976). Factors considered in determining whether the cessation of operations is sufficiently imminent and certain to warrant dismissal of the petition include the period of time between the representation hearing and the expected date of cessation, steps taken by the employer to cease operations, and whether the employees have been notified. See *Hughes Aircraft Co.*, above at 82-83; *Davey McKee Corp.*, above; *Larson Plywood Co.*, above.

## II. FACTS

The Employer has operated for many years from its office in Chester Heights, Pennsylvania. For at least the past five years, the Employer has provided concrete and carpentry services as a subcontractor exclusively for a single general contractor, Woodside Associates. In 2008, the Employer did not have sufficient work to employ any carpenters on a full-time basis but utilized 10 carpenters and two apprentices on jobs as needed. Only two of these employees worked more than 100 days, and six worked fewer than 15 days. The Employer's President, Joseph Oster, the sole witness at the hearing, stated that the majority of the carpenters worked on only one job and were not called back.

Since the start of 2009, the Employer performed two jobs. One job involved nine days of work for one carpenter at a McDonald's restaurant, and the other provided five days work for another carpenter at a Wawa store.<sup>1</sup> These jobs ended on February 16 and 19, respectively, and the employees' time cards indicate that they were laid off after completing the jobs. No carpenters have worked for the Employer since then.

Oster testified that he and two partners jointly own the Employer's business and that they had been discussing closing it for some time before performing the Wawa and McDonald's jobs. On about February 17, 2009, they reached a final decision to cease operations altogether because of a poor business climate. No bids were outstanding at the time, and no additional work was pending. The Employer did not provide notice of the closing of its operations to its recently employed carpenters. The Employer's only other employee, an estimator who had not submitted any bids for jobs in 2009, was laid off in mid-February.

The Employer recently notified the landlord for its leased office space that it would be terminating its lease and has removed its business sign from the building.<sup>2</sup> Oster has notified many of the Employer's suppliers and creditors that the business is now closed. As of the hearing, he was in the process of identifying the Employer's remaining open accounts and was scheduled to meet with his accountant during the following week in order to finalize the business closing. The Employer is not seeking additional work and has no employees other than Oster.

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<sup>1</sup> A third carpenter worked for three days on unspecified tasks in January. The Employer also used a cement mason for one day during 2009.

<sup>2</sup> Oster did not know when the lease expires.

### **III. ANALYSIS**

The Petitioner contends that the Employer has not established that it is permanently closing rather than experiencing a routine lull in business. The Petitioner observes that a hiatus in operations is not uncommon in the construction industry and that the Employer's actions to close the business appear to have been hasty and have not been completed. In this connection, the Petitioner emphasizes that the decision to close the business followed closely upon the February 9 filing of the representation petition in this matter.

Despite the timing of the final decision and the fact that the Employer has not yet completed all details of the closing, the evidence shows that the Employer has ceased operating. The Employer has given notice of the termination of its office lease and is in the process of closing its accounts with suppliers. Moreover, the Employer laid off its estimator, has not bid on any work in 2009, and has no plans to bid on work in the future. No evidence has been presented to indicate that the Employer has made statements or taken action inconsistent with closing its operations or that it intends to resume operations at some future point. The absence of formal notice to employees who have worked for the Employer in the past is insufficient to counter the evidence showing that business activity has ceased, and there is no basis upon which to find that any employees have a reasonable expectation of future employment with the Employer. Under these circumstances, I am dismissing the petition in this matter. *Hughes Aircraft Co.*, above; *Larson Plywood Co.*, above.<sup>3</sup>

### **IV. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization that claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and the petition is therefore dismissed.

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<sup>3</sup> This Decision and Order is made without prejudice to the Petitioner's right to file a motion to reinstate the instant petition should the Employer resume operations.

## V. ORDER

IT IS ORDERED that the petition be, and it hereby is, dismissed.

## VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by e-mail. For details on how to file a request for review by e-mail, see [www.nlrb.gov](http://www.nlrb.gov) and click on E.gov. The request for review must be received by the Board in Washington by 5:00 p.m., EDT on **March 26, 2009**.

Signed: March 12, 2009

at Philadelphia, PA

/s/ [Dorothy L. Moore-Duncan]  
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DOROTHY L. MOORE-DUNCAN  
Regional Director, Region Four  
National Labor Relations Board